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Supreme Court of the United States

OCTOBER TERM, 1957

No. 463

INTERSTATE COMMERCE COMMISSION v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 464

THE PENNSYLVANIA RAILROAD COMPANY v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

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No. 468

DELAWARE RIVER PORT AUTHORITY, ET AL. v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 473

UNITED STATES OF AMERICA v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

On Appeal From The United States District Court For The District Of Maryland

MOTION TO AFFIRM

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October 16, 1957.

The Daily Record Co., Baltimore 3, Md.

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Appellees,[1] pursuant to Rule 16, paragraph 1(c) of the Revised Rules of the Supreme Court, move that the judg-

[1] The Baltimore and Ohio Railroad Company and Western Maryland Railway Company.

ment of the United States District Court for the District of Maryland be affirmed on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Statement of the Case

This is a direct appeal from a judgment of a statutory three-judge District Court entered on May 22, 1957 pursuant to U. S. Code, Title 49, sec. 17(9) and Title 28, secs. 2321-2325. The opinion of the District Court is reported as *The Baltimore and Ohio Railroad Co., et al. v. United States of America, et al.*, 151 F. Supp. 258. By its judgment the District Court decreed that an order of the Interstate Commerce Commission dated October 1, 1956 in its Investigation and Suspension Docket No. 6074, *Iron Ore from Eastern Ports to Central Freight Association Points*, 299 I.C.C. 195, should be (1) in part vacated and the continuance and enforcement of said part enjoined, (2) in part remanded to the said Commission to make more explicit findings, and (3) in part affirmed.

The facts as shown by the report of the Interstate Commerce Commission and as found by the District Court may be summarized as follows:

After World War II the importation of iron ore from foreign sources in heavy volume became an important prospect. For some time steel plants along the North Atlantic coast had been using such iron ore, and there had been movements to Johnstown and Pittsburgh, Pa. About 1950, however, there was promise of heavy consumption at many inland plants, including those located at points within an area known for years in transportation circles as "differential territory," or "central territory." This is territory generally west of a line drawn between Buffalo, New York, and Pittsburgh, Pa. It includes Youngstown, Ohio,

and the 16 other steel-producing points which are directly involved in this litigation.[2]

A principal source of this import iron ore is Labrador. It moves by railroad to the port of Seven Islands, Quebec, thence by water either through the St. Lawrence Seaway to destinations on the Great Lakes or by ocean carrier to a North Atlantic port. In the first case the ore, if not consumed at the lake-front, is transported inland to steel plants in differential territory by rail; and in the second case the ore moves from tidewater to the same differential territory by rail. The owners of the Labrador ore are the Armco Steel Corporation and the other steel companies[3] which, along with M. A. Hanna Company, are among the appellants in this proceeding (hereinafter referred to collectively as the Labrador ore interests). The joint venture which produces the iron ore and brings it to this country goes under the name of the Iron Ore Company of Canada, also an appellant herein, and several subsidiary transport companies. The ownership or control of ocean ore carriers is an integral part of the operation; along with vessels under trip charters, they provide what amounts to shuttle service between the Canadian port of Seven Islands on the St. Lawrence and the ports of discharge in the United States.

The controversy over railroad freight rates from the North Atlantic ports which has culminated in this appeal had its beginning when, on February 9, 1953, the appellant

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[2] In addition to Youngstown, Ohio, the destinations involved in this controversy are: Midland, Farrell, Sharon and Sharpsville, Pa.; Martins Ferry, Mingo Jct., Steubenville, Lowellville, Niles, Struthers, and Warren, Ohio; Benwood, E. Steubenville, Follansbee, Weirton, and Wheeling, W. Va.

[3] Aside from Armco Steel Corporation, the appellant steel companies, each with an interest in Labrador ore, include National Steel Corporation (Weirton Steel Company Division), Republic Steel Corporation, Wheeling Steel Corporation, and the Youngstown Sheet and Tube Company.

Pennsylvania Railroad, with an eye to forcing the movement of import ore through Philadelphia, attempted to publish rates from that port to the 17 destinations in differential territory which were the same as the rates from the port of Baltimore. Contemporaneously, the appellant railroads serving the port of New York published from that port the same Baltimore rates to the 7 stations among the 17 that they were able to reach. The appellee Baltimore railroads thereupon reduced their rates in an effort to continue the traditional differential under Philadelphia, and these further reductions were later matched by the appellant Pennsylvania Railroad with a second reduction from Philadelphia — in an effort to continue parity although on a lower level. It was at this point that the Commission intervened and suspended *all* the proposed rate reductions and instituted an investigation under the provisions of Section 15(7) of the Interstate Commerce Act.

While import iron ore comes in volume from other countries, originating from such scattered foreign sources as Sweden, Liberia, and Venezuela, among others, the prospective Labrador ore is the special prize of this contest over freight rates. This is because it requires relatively more rail transportation, particularly to destinations in differential territory where the Labrador ore interests have their steel plants. Ore from the other foreign sources is largely controlled by steel companies with major operations at tidewater (such as the Sparrows Point plant of the Bethlehem Steel Corporation at Baltimore and the Fairless plant of the United States Steel Corporation on the Delaware River at Morrisville, N.J.), and there is relatively less need for comparable rail service.

As stated in the opinion of the District Court (151 F. Supp. at 264):

> Statistics furnished to the Commission show that during the years 1952, 1953 and eight months of 1954, 94% of all the ore imported through the north Atlantic ports came from Venezuela, Chile, Sweden, Peru, Brazil and Liberia, amounting to 7,229,903 tons in 1952; 8,065,922 tons in 1953 and 6,746,335 tons in 1954. Bethlehem Steel Corporation and United States Steel Corporation consumed most of the imports. Thus, in the eight months of 1954 the aggregate imports of these two corporations amounted to 77% of the total. Imports to these corporations are not delivered to the railroads but are consigned to their own facilities: at Sparrows Point for the Bethlehem Steel Corporation and Fairless (Morrisville, Pa.) for the United States Steel Corporation.
>
> * * * * * *
>
> Looking into the future, the most striking factor to be considered is the assured prospect that importations of iron ore from Labrador will dominate the situation.

Adding emphasis to this finding by the District Court is the fact that the only consumers of iron ore to join in the appeal from its judgment are the Labrador ore interests. The New York appellants, moreover, specifically recognize that "most of the ore presently coming through Philadelphia and Baltimore to the Youngstown area originates in Labrador * * *" (Juris. St. of Erie et al., herein referred to as New York appellants, at 24).

The publication of Baltimore rates from Philadelphia and New York constitutes a direct challenge to a relationship in rates which had existed for almost 80 years. Since 1877, in fact, the rates on export and import traffic through Baltimore have been 20 cents per ton less than the Philadelphia rates and 60 cents less than the New York rates. These differentials give partial recognition to the fact that between Baltimore and destinations in differential territory the rail distances are less than Philadelphia's and

much less than New York's. We say "partial" recognition because if the rates were strictly related to differences in distance, Baltimore's differential would be 33 (instead of 20) cents under Philadelphia and 80 (instead of 60) cents under New York.

A picture of these port relationships is given in the following table which shows the distances to Youngstown, Ohio, the key destination involved in the present litigation, from Baltimore, Philadelphia, and New York, together with the normal rates from Baltimore and the proposed reductions from the other ports:

Port	*Rate*	*Short-line Distance*[a]	*Short Tariff Distance*[b]
Baltimore	$2.71 (normal)	378	381
Philadelphia	2.71 (proposed)	424	428
New York	2.71 (proposed)	490	569

[a] The shortest rail mileage over which carload traffic can pass without charge of lading.

[b] The shortest published route used in every day operation. Youngstown is on the eastern border of differential territory, and the indicated differences in distance are greater when the entire territory is taken into account.

Following the Commission's suspension of the reduced rates, it undertook an investigation pursuant to the provisions of Section 15(7) of the Interstate Commerce Act. Hearings were held in 1953, or before there was any ore movement from Labrador. On February 5, 1954, Division 2 of the Commission filed its report with the conclusions (1) that the reduced rates from Philadelphia of February 9, 1953, as proposed by the Pennsylvania "are just and reasonable," but (2) that the other reductions, including those proposed from New York on the same date, "are not shown to be just and reasonable." *Iron Ore from Eastern Ports to Central Freight Association Points*, 291 I.C.C. 527 at 556.

Within three days after the announcement of this decision the Commission allowed the reduced Philadelphia

rates to go into effect, and for the first time there came into being an actual parity of rates on imported iron ore from Philadelphia and Baltimore to the 17 destinations in differential territory. An effort on the part of the appellees to forestall this publication and in effect to continue the suspension while the litigation continued was rejected by the United States District Court for the District of Maryland "on the ground that the administrative process had not been completed." (Civil Action No. 7140).

There followed numerous petitions for reconsideration of the decision of Division 2, including one by these appellees, and on July 30, 1954, the Commission reopened the proceeding for further hearing. This was completed in late 1954, shortly after the initial shipments of Labrador ore had been made. Importation of this ore through the North Atlantic ports had begun in August of that year; during this first season it was limited to a fraction of the anticipated annual production of 10 or more million tons. But even with respect to this small sample the parity rates at Philadelphia attracted the bulk of the competitive tonnage away from Baltimore.

Almost two years after the further hearing, or on October 1, 1956, the decision of the Commission was reached. (299 I.C.C. 195). It reaffirmed the prior conclusion of Division 2 that the reduced rates of February 9, 1953, from Philadelphia "are just and reasonable" but, with four commissioners dissenting, it reversed the finding of Division 2 as to the proposed reduced rate from New York to Youngstown and held that this rate would be "just and reasonable." (299 I.C.C. 210).

It was this Commission decision "on further hearing" that the appellees as plaintiffs complained of in the United States District Court for the District of Maryland.

The Decision of the District Court

In its decision of April 26, 1957 — the decision which is the subject of this motion to affirm — the District Court (speaking through Circuit Judge Soper, with District Judges Chesnut and Watkins concurring) concluded (1) that the orders of the Commission should be "vacated insofar as they approved the schedules filed to become effective on February 9, 1953, proposing reduced rates from New York to destinations in the Central area, and that the continuance of such schedules should be enjoined," and (2) that "insofar as the orders approved the schedules to become effective February 9, 1953, for reduced rates from Philadelphia to Central territory, the case should be remanded to the Commission to make explicit findings as to the relative costs of ocean shipping of imported iron ore to the ports of Baltimore and Philadelphia and as to the traffic to be reasonably expected at these ports, if parity is continued or if the differential is restored, taking into consideration the volume of traffic that has passed through these ports since February 19, 1954, when parity went into effect." (151 F. Supp. at 278).

This controversy turns on port rate relationships, and in its decision the District Court promptly recognized this crucial issue. After pointing out that the Commission's finding of reasonableness did not necessarily mean that the rates were properly related, the Court held that the transportation standard[4] was the correct test to use, and that the

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[4] As stated in *United States v. Illinois Cent. R.R.*, 263 U. S. 515 at 524: "To bring a difference in rates within the prohibition of Sec. 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions."

Commission had made a plain mistake in its application to the rates from Philadelphia and Baltimore. But the District Court did not stop at this point. It expressly recognized that differences in transportation conditions, as represented by differences in distance, may not necessarily exclude a parity of rates if it involves no undue preference or prejudice.[5] It held (151 F. Supp. at 274):

> Such discrimination is not of itself illegal, for there are numerous instances amongst the myriad rates on file in which disparity of distances are necessarily disregarded in the operation of transportation systems. To condemn a rate on this score it must be shown that, in violation of Section 3 of the statute, the rate results in undue or unreasonable preference or inflicts undue or unreasonable prejudice upon certain territory involved. See *New York v. United States*, 331 U. S. 284, 305, 67 S. Ct. 1207, 91 L. Ed. 1492; *United States v. Illinois Central*, 263 U. S. 515, 524, 44 S. Ct. 189, 68 L. Ed. 417.

The District Court thus recognized that the setting aside of the transportation standard of distance can only be done in the interest of fair competition where no undue preference or prejudice will result. It should never be done to give a competitive advantage to longer-haul ports.

In brief, the reason the District Court upset the order of the Commission was that it promised to give the longer-haul ports of Philadelphia and New York — not competitive equality with Baltimore — but clear competitive advantages. Philadelphia is already one day's steaming time

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[5] Section 3(1) provides that it shall be unlawful for any carrier "to make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . port, port district, gateway, . . . in any respect whatsoever; or to subject any particular person . . . port, port district, gateway, . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . .". As pointed out in *New York Central Railroad Co. v. United States*, 99 F. Supp. 394 at 404, Section 3(1) is "the only section of the statute specifically dealing with the matter of port relationships."

nearer Labrador than Baltimore on the round-trip by ocean, and New York is over two days nearer. In the ordinary case these shorter ocean distances may not mean too much, but in the movement of Labrador ore they are truly significant. In the first place, a large part of this ocean movement is in vessels owned by the steel companies, and the lesser steaming time to Philadelphia and New York is money in their pockets. In the second place, the lesser-steaming time means more trips to these two ports and thus more ore during the limited shipping season. This greater vessel utilization is a factor of much importance to the Labrador ore interests which are appellants here.

The Commission did not find the dispositive facts in this regard or give them meaning. It found that for a round trip the ocean distance between Labrador and Philadelphia is 310 nautical miles less than between Labrador and Baltimore; and between Labrador and New York it is 576 miles less. In its report on further hearing the Commission also found (299 I.C.C. at 198):

> In some circumstances, however, there is a saving of cost to the shipper in routing ore to the North Atlantic port nearest to the port of origin. This might be true on a time charter arrangement or for an integrated shipper.

But there the Commission left the subject unresolved.

Obviously, if Philadelphia and New York have advantages over Baltimore in the ocean transportation from Labrador, they do not also need Baltimore's rail rates to destinations in differential territory to be fairly competitive. The combination would give them clear advantages in the *through* transportation, and it is only with the cost of the *through* transportation that the Labrador ore interests are concerned. Otherwise stated, the application from

Philadelphia and New York of the same rates as from Baltimore would give to these two longer-haul ports (1) rates which are relatively lower, distance considered, than from Baltimore with no transportation standard to justify the difference, (2) rates which are clearly lower than necessary to meet the competition and thus unreasonable under Section 1(5), and (3) rates which violate Section 3(1) by unduly preferring Philadelphia and New York and unduly prejudicing Baltimore.

By its order of remand, therefore, the District Court would have the Commission determine whether parity rates from Philadelphia are lower than necessary to meet the competition and are also unduly preferential and prejudicial. On both of these questions the facts concerning ocean transportation are vital. The same is true of the tonnages which have been passing through the ports of Philadelphia and Baltimore since parity became effective February 19, 1954.

In the case of the New York rates the District Court went one step further and enjoined the establishment of the parity rate schedules which the Commission approved. Here, as distinguished from its treatment of the Philadelphia rates, the Commission did not even go through the form of making the necessary findings, and consequently, its final order was void for lack of basic findings. Since the District Court distinguished between the two rates in its conclusions and final judgment, they will be treated separately in this motion to affirm.

Argument

I.

The Lack of Substance in the Questions Put by Appellants Concerned With the Rate from Philadelphia.

The several arguments made by the appellants in their statements of jurisdiction will be dealt with separately as follows:

First. Certain appellants say that the nature of the case is not understood by the District Court, and they point to its use of the word "prescribe" as falsely describing the action taken by the Commission in approving Philadelphia rates on the Baltimore level.[6] They also say that the Commission did not "strike down" the existing differential.[7]

The District Court fully understood the nature of the case. It pointed out (151 F. Supp. at 274):

> The statute * * * provides that when any schedules stating a new rate are filed the Commission is required to have a hearing as to the lawfulness of the rate and the burden of proof is upon the carrier, proposing the rate to show that it is just and reasonable. 49 U.S.C.A. sec. 15.
>
> In this case the Commission has concluded that the burden was met and we must determine whether the Commission has made basic findings sufficient to support its conclusions and whether there was substantial evidence to support the findings.

The District Court's use of the words "prescribe" and "striking down" fairly describes the substance of what the

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[6] Juris. St. of PRR at 9. Cf. Juris. St. of appellant Erie and N. Y. Central Railroads (hereinafter referred to as New York appellants) at 18, 19.

[7] Juris. St. of PRR at 10.

Commission did on the basis of the record before it. For the Commission required (or "prescribed") parity by approving Baltimore rates from Philadelphia and disapproving lower rates from Baltimore at the same time. These two steps, purposely related, undermined (or "struck down") the traditional differential so far as this proceeding is concerned.

Second. The appellants argue that the District Court would require rate relationships to be governed by differences in distance,[8] and the appellant Interstate Commerce Commission says:

> . . . it is submitted that the Commission did not err in not requiring the Pennsylvania to base its rates from Baltimore and Philadelphia on a distance scale.[9]

The appellants clearly misunderstand the decision of the District Court.

If the rates from Philadelphia and Baltimore were related by what the appellant Commission refers to as a "distance scale," the Baltimore rate would be 33 cents lower than the rate from Philadelphia. Actually, the differential which has obtained in these rates for a period of almost 80 years when applied to export and import traffic generally[10] has been limited to 20 cents, or less than two-

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[8] Juris. St. of PRR at 14; Juris. St. of Labrador ore interests at 15.

[9] Juris. St. of ICC at 15.

[10] The appellant PRR says that this differential has been generally limited to "grain and merchandise traffic" and does not apply to "low-grade, heavy-loading, raw materials moving in volume in open-top cars, such as iron ore, coal and coke." Juris. St. of PRR at 11. But in various rate proposals made in the past the PRR has itself sponsored the differential as applicable to import iron ore rates, and it has been so applied (ICC Rec. at 654-674). Moreover, the PRR's implication that equal rates apply to export coal is false. The differential Baltimore under Philadelphia is 7 cents per ton. Coke does not move from differential territory in foreign commerce. Traditional differentials apply to commodities generally whether high-grade, light-loading, finished materials or "low-grade, heavy loading, raw materials."

thirds of the amount justified by a "distance scale." But the District Court recognized that even the 20-cent differential might properly be set aside if required by competitive conditions, and as we have seen, it held (151 F. Supp. at 274):

> Such discrimination is not of itself illegal, for there are numerous instances amongst the myriad rates on file in which disparity of distances are necessarily disregarded in the operation of transportation systems. To condemn a rate on this score it must be shown that, in violation of Section 3 of the statute, the rate results in undue or unreasonable preference or inflicts undue or unreasonable prejudice upon certain territory involved. See *State of New York v. United States*, 331 U. S. 284, 305, 67 S. Ct. 1207, 91 L. Ed. 1492; *United States v. Illinois Central R. Co.*, 263 U. S. 515, 524, 44 S. Ct. 189, 68 L. Ed. 417.

And after pointing out the Commission's lack of power to divert traffic "from one locality to another simply on the ground that too much traffic passes through one gateway and too little through another," the District Court added (151 F. Supp. at 275):

> This does not mean, of course, that rates are to be rigidly proportioned to respective distances or that a carrier may not reduce its rates to meet competition within the zone of reasonableness. . . .

Instead of requiring adherence to the test of comparative distances, the District Court's remand is for a different purpose, viz., to determine whether the Commission's according of parity rates to Philadelphia gives to the Pennsylvania Railroad a rate lower than necessary to meet the competition under Section 1(5) and to the port itself a rate which is unduly preferential and thus in violation of the provisions of Section 3(1). Philadelphia already has the benefit of shorter ocean distances from Labrador, and when this is added to an inland rate on the same level

as from the shorter-haul port of Baltimore, Philadelphia will of course gain a material competitive advantage in connection with the through service from Labrador to Youngstown. That is the indefensible result which the District Court would guard against — particularly since there is no justification from a transportation standpoint for a lower rate (distance considered) from Philadelphia.

Third. The appellants say that the District Court erroneously criticized the Commission's finding that over the routes of the appellant Pennsylvania Railroad serving both Baltimore and Philadelphia the difference in distance to Youngstown is only 11 miles, and "the service is substantially identical."[11] As put by the appellant Interstate Commerce Commission:

> . . . the Commission found that the service over the Pennsylvania Railroad is substantially identical from both Philadelphia and Baltimore, and it is submitted that this is a rational test for the Commission to use in determining whether a railroad is discriminating against a port. The fact remains, and it is not questioned, that the actual operating distance, that is the actual route of movement over the Pennsylvania Railroad from Baltimore and from Philadelphia to differential territory is substantially the same, the Pennsylvania's operating route from Philadelphia to Youngstown being only 11 miles greater than its operating route from Baltimore. The court, however, states that this standard of comparison is erroneous and holds that the Commission should have used not the route of actual travel, but the theoretical short-line distances or the tariff route distances between these ports and differential territory.[12]

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[11] Juris. St. of ICC at 15; Juris. St. of PRR at 15, 16; Juris. St. of Labrador ore interests at 15, 16.

[12] Juris. St. of ICC at 16.

Again there is clear misunderstanding.

All that the District Court did was to point out that from Baltimore the route of the Pennsylvania is circuitous (as compared with the more direct routes of both the appellee Western Maryland and appellee Baltimore and Ohio) and consequently, the difference of 11 miles between the *direct* route from Philadelphia (operated by the Pennsylvania) and a *circuitous* route from Baltimore (also operated by the Pennsylvania) is without meaning. It is a comparison of unlike things. In a contest such as this over a proper relationship in rates it is elementary that, to the extent comparative distances are a factor, each port (or any other complaining interest) is entitled to its short distance. *Ex-Lake Grain from Ogdensburg to New England*, 208 I.C.C. 385, 391; *Commercial Club of Greeley v. C. & S. Ry. Co.*, 53 I.C.C. 66, 69. As appears from the table on p. 6 supra, the short tariff route from Baltimore is made by the appellee Western Maryland, and when its *direct route from Baltimore* is compared with the Pennsylvania's *direct route from Philadelphia*, the Baltimore distance is 47 miles less. A possible inference from p. 17 of the jurisdictional statement of the appellant Commission that short tariff distances are "theoretical" and do not represent actual operating routes would be false.

Fourth. Certain appellants say that the District Court failed "to accept or give weight to the Commission's finding that the iron ore rate from Philadelphia at issue is just and reasonable, under Section 1(5) of the Act".[13] But rates within the zone of reasonableness may still violate the provisions of Section 3(1), and the District Court correctly held that (151 F. Supp. at 275):

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[13] Juris. St. of Delaware River Port Authority, at 7.

> Even if a reduced rate is reasonable, it is unlawful if it results in undue prejudice. *New York v. United States*, 331 U.S. 284, 297, 298.

As Mr. Justice Brandeis stated in *United States v. Illinois Cent. R.R.*, 263 U.S. 515, 524, the mere fact that one rate is "inherently reasonable, and that the rate from competing points is not shown to be unreasonably low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice."

Moreover, one important aspect of a finding of reasonableness under Section 1(5) is that the rate be no lower than necessary to meet the competition. *Petroleum between Washington, Oregon, Idaho, and Montana*, 234 I.C.C. 609, upheld in *Scandrett v. United States*, 32 F. Supp. 995, aff'd. per curiam, 312 U.S. 661. No such finding can of course be made here. That is another reason why the District Court was unable "to accept or give weight" to the Commission's conclusion that the parity rate from Philadelphia was reasonable under Section 1(5).

Fifth. Appellants say that "Of the greatest importance is the failure of the District Court correctly to apply, interpret and weigh the National Transportation Policy in connection with the issues presented,"[14] and other appellants argue that "In refusing to accept the Commission's finding that a parity of iron ore rates, Philadelphia with Baltimore, is in accordance with the National Transportation Policy, the court has committed serious error."[15] Still other appellants go so far as to contend that:

> Without such Philadelphia-Baltimore rate parity in the event of war or national emergency, in the event

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[14] Juris. St. of Delaware River Port Authority at 7, 8.
[15] Juris. St. of PRR at 19; Juris. St. of ICC at 17.

> of incapacity or over-burdening of the iron ore handling facilities at Baltimore, with completely inadequate facilities at Philadelphia, the national safety could very well be seriously threatened, if not actually jeopardized.[16]

These arguments are beside the point. The District Court did not refuse to accept the Commission's findings in regard to the National Transportation Policy. On the contrary, there was no reason to consider them because the competitive need for parity had not been established first. The District Court, referring to the declaration of the National Transportation Policy in 1940, held (151 F. Supp. at 276):

> This amendment has been cited in a number of decisions which hold that the Commission must follow it as a guide in the enforcement of all the provisions of the statute. No one suggests, however, that the Commission has general authority to build up the transportation system of the country as it deems best in disregard of the right of a locality to enjoy its natural advantages, or in disregard of Section 3 of the statute which prohibits unlawful preferences and unlawful discrimination. At most the national needs constitute one of the factors to be considered while the other factors which have entered into the practice of rate making from the beginning must still be taken into account, the Commission retaining its power to give appropriate weight to each of them.

None will argue that a transportation system adequate for national defense, as one of the objectives of the National Transportation Policy, is fostered by unlawful rate relationships. Indeed, the policy expressly provides that the Commission, in administering the Act and moving towards its objectives, including a transportation system adequate for

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[16] Juris. St. of Labrador ore interests, at 18.

national defense, shall "encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantage. . . ." (49 U.S.C. preceding Sections 1, 301, 901, and 1001).

Accordingly, if a parity of rates causes unreasonable charges or "unjust discrimination, undue preferences or advantages," the National Transportation Policy, instead of being promoted, is actually being defeated. In insisting upon parity in the circumstances of this case, the appellants are really saying that in the interest of national defense they should have rates lower than necessary to meet the competition and an undue and unreasonable advantage. If ore can be brought from Labrador to Philadelphia for, say, 20 cents less than to Baltimore, will anyone say that the "national safety" would be "seriously threatened" if the rail rate from Philadelphia were 20 cents higher than from Baltimore? None of the appellant steel companies can possibly require more than an equalization of through transportation costs, and if this is brought about, the tremendous ore unloading facilities at Philadelphia — which the Pennsylvania Railroad started to erect in 1951 *or two years before it even filed the parity rates from Philadelphia here involved* — should not wither on the vine.

Sixth. The appellants say with respect to that part of the remand order which would require the Commission to consider ocean transportation costs that the Commission "did not consider this as of controlling importance in reaching its ultimate conclusion,"[17] and the Commission itself argues that it was "not required to disallow the Pennsylvania rates because the rates do not attempt to equalize

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[17] Juris. St. of PRR at 16.

the total transportation costs, ocean and rail, from Labrador to differential territory."[18]

The Commission's findings in this connection were limited to certain facts which, when put together, should mean important advantages in ocean transportation to Philadelphia as compared with Baltimore. But the Commission itself did not find such advantages (except inferentially), or indeed reach any conclusion at all. As correctly found by the District Court (151 F. Supp. at 269):

> The Commission . . . made no specific findings as to the ownership of the vessels in which this ore was carried to the two ports or as to the difference in cost between a voyage to Philadelphia and a voyage to Baltimore.

And after citing the Commission's finding of differences in ocean distances and its statement "that in some instances there is a cost saving in routing ore to the nearest port 'on a time charter or for an integrated shipper,'" the District Court held that (151 F. Supp. at 277):

> These findings are vague and inconclusive for they do not show to what extent differences in distance by sea will influence the movement of the ore.

The very purpose of the remand of course is to enable the Commission to make up this deficiency and to determine whether a parity of rates from Philadelphia and Baltimore puts Philadelphia at a competitive advantage in disregard of the fact that by the transportation standard Baltimore has the geographical advantage. The railroads may not be under an obligation "to equalize total costs through the North Atlantic ports," but certainly the Commission is under an obligation to determine whether the failure to do so produces rates lower than necessary to meet the competition and a rate relationship unlawful

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[18] Juris. St. of ICC at 15.

under section 3(1). These determinations the Commission did not make, and the purpose of the remand is to have the Commission make them.

Seventh. The appellants say with respect to that part of the remand order which would require the Commission, in reaching a conclusion as to a lawful rate relationship, to take "into consideration the volume of traffic that has passed through these ports since February 19, 1954, when parity went into effect" that the "records before administrative agencies must at some point be closed," and "no compelling reason has been advanced by the court to reopen the record in this instance."[19] The appellant Delaware River Port Authority observes that "there is nothing to indicate that such statistics, if produced, would alter the basic picture reflected by the statistics already of record and relied upon by the Commission,"[20] and the Labrador ore interests argue that the "prospective tonnages of foreign iron ore importations with respect to the ports of Philadelphia and Baltimore" are already the subject of "explicit, clear-cut and unequivocal findings."[21]

The parity rates from Philadelphia and Baltimore became effective February 19, 1954, and the record in this proceeding closed December 21, 1954. Consequently, so far as this record goes, the experience under parity is limited to 10 months in 1954 — a brief period during which the movement had only begun to gather momentum. From Labrador, for instance, there was no movement prior to 1954, and the first shipments in that year did not materialize until August when the season was well along. At that time the rate of production was only a fraction of antici-

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[19] Juris. St. of PRR at 16-17. Cf. Juris. St. of N. Y. appellants at 20.

[20] Juris. St. of Delaware River Port Authority, at 9.

[21] Juris. St. of Labrador ore interests at 19.

pated levels. Even so, the record shows that the 1954 tonnage through Philadelphia under a parity of rates to the 17 points in differential territory leapt forward and gave every indication of far out-pacing Baltimore in the years ahead.

But as to what has happened under parity since December, 1954, the record of course is silent. The Commission took almost two years to reach its decision on further hearing, and the interval since has been taken up with the proceedings in court.

Clearly, evidence as to what parity has meant — as the volume of import iron ore has been increasing to anticipated levels — is important on the issue of a lawful rate relation. On the question of whether the longer-haul port of Philadelphia has gained a competitive advantage under a parity of rates, a showing as to its share of the competitive traffic is certainly relevant. The District Court specifically provided that the parity of rates should remain in effect *pending* the Commission's further inquiry. The fervor with which the appellants resist a disclosure suggests that it would not support a parity of rates.

II.

The Lack of Substance in the Questions Put by Appellants Concerned with the Rate from New York

Instead of an order of remand, the District Court, as we have seen, enjoined the Commission's order approving the same rates from New York as from Baltimore.

First. The different treatment of New York is the principal question raised by the United States on this appeal. The Solicitor General says:

> Assuming, *arguendo*, that the district court correctly held that the Commission's findings were inadequate to justify the elimination of the differential from New York, we think that the court nevertheless erred in vacating the order disapproving such rates, without giving the Commission an opportunity to make further findings on remand.[22]

And then, after pointing out the further findings required of the Commission in the remand of the Philadelphia rates (as dealt with in the foregoing section of this motion), the Solicitor General says further:

> We submit that the court similarly should have remanded to the Commission to make such findings with respect to the port of New York. The failure to do so seems explicable only on the theory that the court took a narrow view of the extent of the Commission's powers. In our view, the disparity in distances between the ex-Baltimore and ex-New York movements does not in and of itself preclude equality of rates. And if further findings are required (as may well be the case) to demonstrate a need for eliminating the differential, it is erroneous to cut off the administrative process.[23]

It is submitted that this question as raised by the United States lacks substance.

In this proceeding the only action taken by the Commission was to approve as "just and reasonable" under Section 15(7) a reduced rate from New York which was the same as the rate from Baltimore. The Commission did not prescribe parity as a principle to govern future rate-making, nor did it make any findings which would preclude rates on different levels if justified by a different record.

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[22] Juris. St. of Dept. of Justice, at 5.
[23] Ibid.

Accordingly, the effect of the District Court's judgment is to preclude from New York the same rate as from Baltimore on the basis of the present record. In no way, however, would the order of the District Court operate to prevent the New York appellants, if they should want to try again, from seeking to justify on a different record the same rates which, on this record, the District Court enjoined. Nor would the order of the District Court stand in the way of the Commission's reopening the proceeding either on petition or by its own initiative. Thus a continuance of the administrative process is not cut off. On the contrary, its continuance depends on the initiative of the New York appellants in bringing another proceeding under Section 15(7), or action by the Commission in continuing the present proceeding.

Second. It is not to be inferred from the foregoing that the action of the District Court in enjoining the parity rate from New York lacks support. On the contrary, the plain truth is that the Commission approved parity rates from New York without any finding as to whether they would be lower than necessary to meet the competition or create a lawful relationship under the provisions of Section 3(1). The result is that the Commission's action is void for lack of basic findings, and the District Court took the proper course in entering an injunction. *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504, 505. As stated in the cited opinion by Mr. Justice Cardozo for an unanimous Court:

> This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida v. United States*, 282 U.S. 194, 215; *United States v. Baltimore & Ohio R. Co.*, 293 U.S. 454. "In the absence of such findings, we are not

> called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit." *Florida v. United States, supra.* Orderly review requires that this objection, being basic and jurisdictional, be disposed of at the beginning.

It is elementary that when the appellant New York railroads proposed from New York the same rates as from Baltimore, an important part of their statutory burden of proof was to justify the proposed rates as not lower than necessary to meet the competition and as creating a lawful relationship under the provisions of Section 3(1). A showing of reasonableness *per se* would not be enough. As stated in *Kenny v. United States,* 103 F. Supp. 971, 974:

> The statute reserves to the carrier a primary right to establish tariffs but vests in the Commission the authority to determine their "lawfulness." *United States v. Chicago, M., St. P. & P. R. Co.,* supra, 294 U. S. 506 and 510, 55 S. Ct., 462; *Skinner & Eddy Corp. v. United States,* 249 U. S. 557, 564, 565, 39 S. Ct. 375, 63 L. Ed. 772; *Interstate Commerce Commission v. Louisville & Nashville R. Co.,* 227 U.S. 88, 92, 33 S. Ct. 185, 57 L. Ed. 431. This power is specifically defined by Section 15(7), supra. The burden is upon the carrier to prove not only that the proposed tariffs are "just and reasonable" but also that they are lawful. Ibid. The proposed tariffs may be approved as "just, reasonable and not unlawful" only if they meet the statutory requirements.

This requirement is apparently[24] appreciated by the New York appellants, and what do they point to as evidence that New York rates on the same level as from Baltimore represent a lawful relationship? They quote the follow-

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[24] We say "apparently" because the New York appellants devote much of their statement to distinguishing between rates which, as here, are proposed by carriers and rates which can be required by the Commission, and they say that "The district court's erroneous conclusion stems largely from this failure to understand the difference

ing extract from the Commission's report (299 I.C.C. 208) as dispositive:

> It has long been recognized that carriers may, *within lawful bounds*, so adjust their rates as to secure a fair proportion of the traffic, as well as reasonably to foster the ports which they serve. That appears to be what the respondents here have attempted to do. (Emphasis supplied by New York appellants).

Conceding, *arguendo*, that what the New York railroads "attempted to do" was to make rates from New York "within lawful bounds," the question which the Commission leaves undecided is, did the New York railroads succeed in doing so? The Commission's report will be searched in vain for a clear finding on the crucial issues. The Commission did not even go through the form of finding compliance with the provisions of Section 3(1). The only sentence in the report which remotely concerns the relationship created by the same rates from New York as from Baltimore is that (299 I.C.C. at 209):

> the iron-ore tonnage through Baltimore will probably continue to increase even though rate parity is maintained at Philadelphia, *and this appears to be a reasonable assumption with rate parity also at New York.* (Italics supplied).

But a proper rate relationship cannot depend alone upon an "assumed" increase in tonnage at Baltimore. Certainly

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between voluntary and compulsory action." Juris. St. of New York appellants, at 19.

It is of course true that in meeting competition a carrier may publish a lower rate level than the Commission can require, but this does not mean that there is any relaxation of the rules against rates lower than necessary to meet the competition under Section 1(5) or rates which are unduly preferential or prejudicial under Section 3(1). If anything, the publication of carrier-made rates to meet competition are subject to more exacting tests in these two respects than ordinary rates. *Iron and Steel to Iowa, Minnesota, Michigan and Wisconsin*, 297 I.C.C. 363; *Petroleum Products in California and Oregon*, 284 I.C.C. 287.

this "assumption" which the Commission accepts as "reasonable" falls far short of constituting a clear finding as to a proper relationship in rates. Again the language of Mr. Justice Cardozo, speaking for an unanimous Court in *United States v. Chicago, M., St. P. & P. R. Co.*, supra, at 510-511, is appropriate:

> We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. * * * The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U.S. 74, 86; *Florida v. United States*, 282 U.S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong.

Clear and unequivocal findings were particularly important in the case of the New York rates. For here, the parity of rates which the Commission approved involves the setting aside of a distance disadvantage for New York of 188 miles over short tariff routes (151 F. Supp. at 267) — a distance disability of about 50 percent. And yet the Commission's report on the New York rates makes no mention of Section 3(1) and includes no findings thereunder. The Commission's order therefore is plainly void and the proper subject of an injunction.

Third. The New York appellants say that "Were the court's decision to be reversed with respect to New York's continuation in the case, the Commission would presumably be directed to make the same specific findings as to New York" as required by the District Court in the case of

Philadelphia, and they argue that "Even if the court had such power [of remand], the additional findings requested would be of little or no value and would not justify the remand."[25] While these appellants acknowledge that "most of the ore" to the Youngstown area where their parity rates would apply "originates in Labrador," they say that this ore is tied to other ports, and "If the New York carriers are to get any sizeable volume of imported iron ore traffic it will probably have to come not from Labrador but from countries where New York is at an ocean distance disadvantage."[26] This position raises two questions which were not considered in the Commission's report: first, under a parity of rail rates, why would not New York's ocean advantage of 576 nautical miles for the round-trip be controlling in the routing of Labrador ore to Youngstown? And second, if New York must look elsewhere for import iron ore to move to Youngstown, where will it look when, for the most part, Youngstown has ownership rights in Labrador ore through the Iron Ore Company of Canada and enjoys what amounts to preemptive rights?

By the transportation standard New York has no possible claim to a parity of rates, and it is elementary that this standard will not be set aside to give New York, as the long-haul port, a competitive advantage.

Fourth. The appellant Commission, after pointing out that iron ore cannot move through a port without an unloading facility, says "that no iron ore unloading facility will be built at New York unless there is a parity of rates," and

> "From its over-all knowledge of the transportation system of the country, and particularly the facilities needed for unloading and moving iron ore, the Com-

[25] Juris. St. of N. Y. appellants at 20, 25.
[26] Id. at 23.

mission was in a position to conclude that it would be in the interests of national defense to have more than one North Atlantic port equipped for the importation of iron ore."

Contrary to the implication in this statement, there are already three North Atlantic ports equipped for the importation of iron ore, viz., Philadelphia, Baltimore, and Hampton Roads. Moreover, these ports will only be used, in reaching the territory here in question, in keen competition with the St. Lawrence — which route provides a number of additional unloading facilities at the several Lake Erie ports. To suggest that still another unloading facility at New York is required in the interest of national defense is untenable.

There is no testimony in this record from any representative of the national defense establishment, or any user of iron ore, that parity rates are required from New York. The Labrador ore interests are wholly disinterested. They do not even join in the appeal from the order of the District Court which enjoins the New York rate.

National defense is one of the objectives of the National Transportation Policy. But this policy provides no separate standards for judging the lawfulness of rates under the Interstate Commerce Act, let alone standards which may be given over-riding effect. In fact, unless and until a parity rate can be found to be no lower than necessary to meet the competition and to create a proper rate relationship, such a rate contravenes the National Transportation Policy. For as we have seen, this policy provides that, in administering the Interstate Commerce Act and in reaching its objectives, including a transportation system adequate for national defense, the Commission shall

"encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages . . .".

Conclusion

The District Court, in holding that the Commission's order was not based on adequate findings, was clearly right. This ground sustains the decision on appeal. The motion to affirm should be granted.

Respectfully submitted,

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